

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

NAZILA MAHGEREFTEH and  
PATRICIA MONTORO,  
Plaintiffs,  
vs.  
CITY OF TORRANCE, JOYCE  
CHAN, and NICHOLAS P. REA  
Defendants.

Case No.: CV 17-2835 CBM

## AMENDED

**ORDER RE: PARTIES' MOTIONS  
FOR PARTIAL SUMMARY  
JUDGMENT [DKT. NOS. 35, 40]**

The matters before the Court are the parties' respective motions for partial summary judgment. (Dkt. Nos. 35, 40.) Defendants seek summary judgment in their favor on Plaintiff Mahgerefteh's § 1983 claim for unreasonable seizure under the Fourth Amendment. Plaintiffs seek summary judgment that certain provisions of the Torrance Municipal Code relating to its farmers' market are unconstitutional under the First Amendment and the speech/petition provisions of the California Constitution.

## I. BACKGROUND

The facts are largely undisputed. Defendant City of Torrance (“the City”) owns and operates a public Farmers’ Market (“the Market”), which takes place in the parking lot of Charles H. Wilson Park every Tuesday and Saturday from 8 a.m.

1 to 1 p.m. (Dkt. No. 42, Defendants' Response to Plaintiffs' Statement of  
2 Undisputed Facts ("PSUF") # 9.) It is open to the public, and no fee is charged to  
3 enter or use the Market, the parking lot, or the park. (PSUF # 9.) The fifth largest  
4 farmers' market in the United States, the Market is roughly 79,568 square feet in  
5 size and can attract 2,953 or more customers on a given market day. (PSUF ## 29-  
6 30, 38.) Defendant Joyce Chan is the Market's manager. (Dkt. No. 45-1, Plaintiffs'  
7 Response to Defendants' Statement of Undisputed Facts ("DSUF") # 7.)  
8 Defendant Nicholas Rea is a police officer employed by the City of Torrance.  
9 (*Compare* Dkt. No. 1 ¶ 7 *with* Dkt. No. 13 ¶ 7.)

10 Sellers reserve and occupy stalls at the Market to sell their goods and  
11 services to the public, and the City generates revenue by collecting a percentage of  
12 sellers' gross sales. (PSUF # 10.) The Market also includes a 10' x 30' "Expressive  
13 Conduct Area," where spaces may be reserved for activities such as "fundraising  
14 and information sharing by community groups and individuals, political  
15 outreach[,] and campaigning." (Dkt. No. 37-1, Torrance Municipal Ordinance  
16 No. 3791, Ex. A (Torrance Certified Farmers' Market Rules and Regulations  
17 ("Market Rules")) §§ I.5, III.4.) The Expressive Conduct Area is divided into three  
18 10' x 10' stalls, and no more than three "Expressive Conduct Users" are allowed to  
19 set up a stall in the Expressive Conduct Area per Market day. (PSUF # 26; Market  
20 Rules § III.4.) Those who wish to use the Expressive Conduct Area apply in  
21 advance for a spot, and a member of the City staff assigns one of the three spaces  
22 on a first-come-first-served basis. (DSUF # 4.) Applicants are limited to reserving  
23 a space at one Tuesday Market and one Saturday Market each month. (Market  
24 Rules § III.4.) Each Market day, any unreserved spaces can be claimed by  
25 submitting an application between 7:00 a.m. and 7:30 a.m. (*Id.*) Unreserved spaces  
26 are also assigned on a first-come-first-served basis, and there are no limits on the  
27 number of times an individual or group may apply for and use an unreserved  
28 space. (*Id.*)

The Market Rules prohibit the following activities, except at Expressive Conduct User Spaces:

- “Circulating an initiative or referendum petition, or circulating advertising brochures”
- “Unauthorized solicitation — For purposes of this prohibition, ‘unauthorized solicitation’ means solicitation that is unrelated to the Market, is not conducted from an authorized selling space, or both. These prohibitions do not preclude any person or organization from conducting these activities during Market hours on sidewalks or other public property adjacent to the Market. Violations of these prohibitions will result in expulsion from the Market for the remainder of that Market day.”
- “Commercial photography or videotaping”

(Market Rules § II.8.) Violation of the Market Rules constitutes a misdemeanor.  
(Torrance Municipal Code § 412.1.1-2.)

Plaintiffs Nazila Mahgerefteh and Patricia Montoro, who regularly attend the Market, are advocates of veganism. (PSUF ## 11-12.) They have engaged in advocacy of veganism at the Market on various occasions. (PSUF # 11.) In June 2016, Montoro reserved an Expressive Conduct Space for Saturday, July 23, 2016. (DSUF # 11.) On Saturday, July 2, 2016, Mahgerefteh and Montoro utilized an Expressive Conduct Space reserved by Mahgerefteh. (DSUF # 10.) On July 6, Chan emailed Montoro to inform her that her reservation of an Expressive Conduct Space for July 23 was forfeited because Montoro had already used an Expressive Conduct Space one Saturday in July. (DSUF # 11.)

On July 23, Mahgereteh attempted to utilize an Expressive Conduct Space at the market. (DSUF # 12.) Mahgereteh did not have a reservation for an Expressive Conduct Space on this date, and she was informed by City staff that

1 she would not be allowed to use the Expressive Conduct Area. (DSUF # 13.<sup>1</sup>)  
2 Plaintiff objected and refused to leave. (DSUF # 14.) Chan informed Defendant  
3 Officer Rea and another City officer that Mahgerefteh was violating the Market  
4 Rules and trespassing. (DSUF # 16.) The officers advised Mahgerefteh that she  
5 was not allowed to utilize the Expressive Conduct Area on that day, but she  
6 refused to leave. (DSUF ## 17-18.) The officers then “began to arrest”  
7 Mahgerefteh. (DSUF # 20.) Officer High grabbed Mahgerefteh’s right arm, while  
8 Officer Rea grabbed her left arm. (DSUF ## 21-23.) After a few seconds of being  
9 held, Mahgerefteh said that she would leave and the officers released her. (DSUF  
10 ## 25-28.)

## 11 **II. LEGAL STANDARD**

12 Pursuant to Rule 56 of the Federal Rules of Civil Procedure, a “court shall  
13 grant summary judgment if the movant shows that there is no genuine dispute as  
14 to any material fact and the movant is entitled to judgment as a matter of law.”  
15 Fed. R. Civ. P. 56(a). The moving party bears the initial burden of informing the  
16 court of the basis for its motion and identifying those portions of the record it  
17 believes demonstrate the absence of a genuine issue of material fact. *Celotex*, 477  
18 U.S. at 323. A factual dispute is “genuine” only if there is a sufficient evidentiary  
19 basis on which a “reasonable jury could return a verdict for the non-moving  
20 party.” *Anderson*, 477 U.S. at 248; *see also Scott v. Harris*, 550 U.S. 372, 380  
21 (2007) (“Where the record taken as a whole would not lead a rational trier of fact  
22 to find for the non-moving party, there is no ‘genuine issue for trial.’”) (quoting  
23 *Matsushita*, 475 U.S. at 586-87). A fact is “material” only if it might affect the  
24 outcome of the suit under governing law. *Anderson*, 477 U.S. at 248.

25  
26  
27 <sup>1</sup> Plaintiffs dispute certain aspects of DSUF # 13, but do not dispute that Mahgerefteh did not  
28 have a reservation for that day or that she was informed by City staff that she would not be  
allowed to use the Expressive Conduct Area.

If the moving party satisfies this initial burden, Rule 56 requires the party opposing the motion to respond with a “showing sufficient to establish the existence of [each properly challenged] element essential to that party’s case, and on which that party will bear the burden of proof at trial … since a complete failure of proof concerning an essential element of the nonmoving party’s case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 322-23. In attempting to establish a genuine factual dispute, the opposing party may not rely upon conclusory allegations or pleading unsupported by factual data, but instead must “go beyond the pleadings and by [its] own affidavits, or by the depositions, answers to interrogatories, and admissions on file, designate specific facts showing that there is a genuine issue for trial.” *See Celotex*, 477 U.S. at 324. “When the moving party has carried its burden under Rule 56(c), its opponent must do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita*, 475 U.S. at 586. “If the [opposing party’s] evidence is merely colorable, or is not significantly probative, summary judgment may be granted.” *Liberty Lobby*, 477 U.S. at 249-50.

“[I]nferences to be drawn from the underlying facts,” however, “must be viewed in the light most favorable to the party opposing the motion.” *See Matsushita*, 475 U.S. at 587. At the summary judgment stage, the court’s function is not to weigh the evidence or determine the truth of the matter but, rather, to determine whether there is any genuine issue for trial. *Anderson*, 477 U.S. at 249; *Balint v. Carson City*, 180 F.3d 1047, 1054 (9th Cir. 1999) (en banc).

In determining any motion for summary judgment or partial summary judgment, the court may assume that the material facts as claimed and adequately supported by the moving party are admitted to exist without controversy except to the extent that such material facts are (a) included in the opposing party’s “Statement of Genuine Disputes” and (b) controverted by declaration or other

1 evidence filed in opposition to the motion. C.D. Cal. L.R. 56-3; Fed. R.  
2 Civ. P. 56(e)(2).

3 **III. DISCUSSION**

4 **A. Defendants' Motion for Partial Summary Judgment**

5 Defendants seek summary judgment on Plaintiff Mahgerefteh's cause of  
6 action for unlawful arrest in violation of the Fourth Amendment. Defendants argue  
7 that Plaintiff's Fourth Amendment rights were not violated because Officer Rea  
8 had probable cause to arrest Plaintiff on July 23, 2016 based on a violation of the  
9 Market Rules, which constitutes a misdemeanor under the Torrance Municipal  
10 Code. "If an officer has probable cause to believe that an individual has committed  
11 even a very minor criminal offense in his presence, he may, without violating the  
12 Fourth Amendment, arrest the offender." *Atwater v. Lago Vista*, 532 U.S. 318, 354  
13 (2001). This is true even when the arrest is based on a city ordinance that is later  
14 declared unconstitutional. *Michigan v. DeFillippo*, 443 U.S. 31, 37-38 (1979).  
15 Accordingly, the constitutionality of the Market Rules themselves is irrelevant to  
16 whether Rea's arrest of Plaintiff for violation of those rules was an unreasonable  
17 seizure under the Fourth Amendment.

18 Here, it is undisputed that Mahgerefteh was attempting to use an Expressive  
19 Conduct User Space on July 23, 2016, despite the fact that she had not applied for  
20 and been assigned a space for that day. (DSUF # 12-13.) She was therefore in  
21 violation of the Market Rules, which require an application in order to utilize an  
22 Expressive Conduct User Space. (Market Rules § III.4.) This constitutes a  
23 misdemeanor pursuant to the Torrance Municipal Code. (Torrance Municipal  
24 Ordinance 3791 § 412.1.2(a), Dkt. No. 37-1.)

25 Mahgerefteh argues that she was not in violation of the Market Rules  
26 because she had been hired by Plaintiff Montoro to attend the Market in  
27 Montoro's place and use her Expressive Conduct User Space. This argument fails  
28 for two reasons. First, Chan had cancelled Montoro's July 23 reservation because

1 Montoro had used an Expressive Conduct User Space on July 2. (DSUF # 11.)  
2 Accordingly, neither Montoro nor Mahgereteh had a valid reservation for July 23.  
3 Second, even if Montoro would have had a valid reservation for July 23,  
4 Mahgereteh did not. The Market Rules do not appear to have any provision that  
5 permits an individual to utilize someone else's reservation, and Mahgereteh has  
6 not identified one. However, even assuming that Plaintiffs' interpretation of the  
7 Market Rules is correct and an individual may delegate the use of her reservation  
8 to someone else, the Market Rules can also be reasonably interpreted as requiring  
9 a reservation by the individual who is actually utilizing the Expressive Conduct  
10 User Space. Thus, Officer Rea's interpretation of the Market Rules as prohibiting  
11 Mahgereteh's use of the Space—even if potentially incorrect—was at least  
12 reasonable. When a seizure is based on a reasonable, albeit mistaken,  
13 interpretation of a statutory prohibition, the seizure itself is still reasonable for  
14 Fourth Amendment purposes. *Heien v. North Carolina*, 135 S. Ct. 530, 534, 536  
15 (2014).

16 Because Mahgereteh was using an Expressive Conduct User Space without  
17 permission when Rea arrived, Rea “ha[d] probable cause to believe that [she]  
18 ha[d] committed … [a] criminal offense in his presence, [so] he [could], without  
19 violating the Fourth Amendment, arrest the offender.” *Atwater*, 532 U.S. at 354.  
20 Accordingly, based on the undisputed facts, Defendants are entitled to judgment as  
21 a matter of law on Plaintiff Mahgereteh’s Fourth Amendment claim for unlawful  
22 seizure.

23 **B. Plaintiffs’ Motion for Partial Summary Judgment**

24 Plaintiffs seek partial summary judgment declaring § I.5, § II.8, and § III.4  
25 of the Market Rules to be unconstitutional.<sup>2</sup> The relevant provisions are set forth in  
26 an appendix to this order.

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27  
28 <sup>2</sup> In their opening brief, Plaintiffs also argue that § II.7 of the Market Rules is unconstitutionally  
vague. However, § II.7 is not mentioned in Plaintiffs’ notice of the motion (Dkt. No. 40 (Notice

## 1. Construction of the Challenged Provisions

Before turning to the constitutionality of the challenged provisions, the Court must first interpret the provisions to determine what is and is not prohibited by them. *See Frisby v. Schultz*, 487 U.S. 474, 482 (1988). The provisions are contained in three different parts of the statute. The first part is a section defining the term “Expressive Conduct Users” to “include … fundraising and information sharing by community groups and individuals, political outreach and campaigning.” (Market Rules § I.5.) This section also establishes an area within the Market to be provided for Expressive Conduct Users on a first-come–first-served basis. (*Id.*)

The second part of the Market Rules containing challenged provisions is a section prohibiting certain activities within the Market area, except in Expressive Conduct User Spaces. (Market Rules § II.8.) The prohibited activities are (1) “[c]irculating an initiative or referendum petition, or circulating advertising brochures”; (2) “solicitation that is unrelated to the Market, is not conducted from an authorized selling space, or both”; and (3) “[c]ommercial photography or videotaping.” (*Id.*) “Information sharing” is not on the list of activities prohibited outside Expressive Conduct User Spaces. (*Id.*)

The third part of the Market Rules containing challenged provisions is in a section that sets out the categories of “Admissible Sellers and [P]roducts.” (Market Rules § III.) This section includes “Expressive Conduct Users” as a category of admissible sellers “allowed in a designated area of the Market.” (Market Rules § III.4.) It also limits the number of Expressive Conduct Users permitted to set up in that area to three or fewer. (*Id.*) Finally, this section sets forth procedures for reserving space in the Expressive Conduct Area and imposes

of Motion) at 2), their request for relief (Dkt. No. 40 (Motion) at 22), or their proposed order (Dkt. No. 40-6). Accordingly, the Court does not consider this argument.

1 limits on how frequently individuals can reserve such Expressive Conduct User  
2 Spaces. (*Id.*)

3 Plaintiffs' motion is largely premised on the assumption that any conduct  
4 falling within § I.5's definition of "Expressive Conduct"—specifically,  
5 "fundraising and information sharing by community groups and individuals,  
6 political outreach and campaigning"—is permitted only within the Expressive  
7 Conduct Area. While recognizing that the Rules do not contain any express  
8 prohibition to this effect, Plaintiffs interpret the Market Rules to implicitly limit  
9 information-sharing and other expressive conduct to the Expressive Conduct Area  
10 by setting aside dedicated space for Expressive Conduct Users. Accordingly, their  
11 challenge to the Market Rules presumes that any limits on their use of Expressive  
12 Conduct User Spaces also constitute limits on their ability to engage in  
13 "information sharing" within the Market itself. Three principles counsel against  
14 construing the Market Rules in this manner.

15 First, the Market Rules contain an express provision prohibiting certain  
16 expressive activities outside the Expressive Conduct Area—specifically,  
17 circulating petitions and advertising brochures, unauthorized solicitation, and  
18 commercial photography/videography—and this prohibition is much more limited  
19 than the definition of "Expressive Conduct." (*Compare* Market Rules § II.8 with  
20 Market Rules § I.5.) If the drafters of the Market Rules had intended to prohibit all  
21 "Expressive Conduct" outside the Expressive Conduct Area, they could easily  
22 have included "Expressive Conduct" in § II.8's list of prohibited activities, but  
23 they did not. *See Leatherman v. Tarrant Cty. Narcotics Intelligence &*  
24 *Coordination Unit*, 507 U.S. 163, 168 (1993) ("*Expressio unius est exclusio*  
25 *alterius.*").

26 Second, because the term "information sharing" is clearly broad enough to  
27 encompass "circulating advertising brochures," any implicit prohibition on  
28 information sharing outside Expressive Conduct User Spaces would also effect an

1 implicit prohibition on the circulation of advertising brochures as well.  
2 Interpreting the Market Rules in this way would thus treat § II.8's express  
3 prohibition "essentially as surplusage—as words of no consequence. Judges  
4 should hesitate so to treat statutory terms in any setting...." *Ratzlaf v. United*  
5 *States*, 510 U.S. 135, 140 (1994); *see also South Carolina v. Catawba Indian*  
6 *Tribe, Inc.*, 476 U.S. 498, 510 n.22 (1986) (It is an "elementary canon of  
7 construction that a statute should be interpreted so as not to render one part  
8 inoperative.") (quoting *Colautti v. Franklin*, 439 U.S. 379, 392 (1979)). Because  
9 Plaintiffs' interpretation of the Market Rules would render one of § II.8's  
10 prohibitions redundant, it is disfavored compared to one that would render the  
11 provision operative.

12 Finally, "Expressive Conduct" as defined in § I.5, which "include[s] but [is]  
13 not limited to ... information sharing," is such a broad category of expression that  
14 a prohibition on all "Expressive Conduct" outside the Expressive Conduct Area  
15 would raise serious constitutional concerns. *See Airport Comm'rs v. Jews for*  
16 *Jesus, Inc.*, 482 U.S. 569, 573-75 (1987). This counsels against reading such a  
17 broad prohibition into the Market Rules absent a clear textual provision to that  
18 effect. *See Frisby v. Schultz*, 487 U.S. at 483 ("To the extent they endorsed a broad  
19 reading of the ordinance, the lower courts ran afoul of the well-established  
20 principle that statutes will be interpreted to avoid constitutional difficulties.").

21 Accordingly, the Court interprets the Market Rules to prohibit only those  
22 activities enumerated in § II.8 outside the Expressive Conduct Area. Activities not  
23 included in § II.8 are not prohibited by the Market Rules, irrespective of whether  
24 they fall into § I.5's definition of "Expressive Conduct." Thus, while Expressive  
25 Conduct User Spaces are available to anyone falling within the definition of  
26 "Expressive Conduct Users," an individual who does not wish to engage in  
27 activities prohibited under § II.8 is not limited to the Expressive Conduct Area  
28 when engaging in other forms of "information sharing."

1           Similarly, the Court interprets the provisions of § III.4 to apply only to  
2 individuals wishing to use Expressive Conduct User Spaces, not to individuals  
3 engaging in non-prohibited expressive conduct outside the Expressive Conduct  
4 Area. Section III.4 is in the division of the Market Rules outlining the  
5 requirements to be considered an “Admissible Seller.” (Market Rules § III.) Thus,  
6 § III.4 only applies to individuals who wish to be admitted into the Market as  
7 Admissible Sellers, that is, individuals who wish to set up booths in the  
8 Expressive Conduct Area of the Market. This section does not purport to require  
9 individuals engaged in permissible “information sharing” outside the Expressive  
10 Conduct Area to submit an application in advance, since the application process is  
11 for reserving an Expressive Conduct User Space within that area.

12           **2. Determination of the Relevant Forum**

13           Courts apply “forum analysis” when evaluating First Amendment claims  
14 relating to speech on government property. Under this approach, the Court must  
15 “first determine whether the property [at issue] is a traditional public forum, a  
16 designated public forum, or a nonpublic forum in order to ascertain what level of  
17 scrutiny to apply to restrictions on speech.” *American Civil Liberties Union of*  
18 *Nevada v. City of Las Vegas*, 333 F.3d 1092, 1097-98 (9th Cir. 2003) (internal  
19 citations omitted).

20           “The ability to restrict speech in public forums, whether traditional public  
21 forums or designated public forums, is ‘sharply circumscribed.’” *Id.* at 1098  
22 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 45  
23 (1983)). In order for the State to enforce a content-based exclusion in a public  
24 forum, “it must show that its regulation is necessary to serve a compelling state  
25 interest and that it is narrowly drawn to achieve that end.” *Id.* (quoting *Frisby v.*  
26 *Schultz*, 487 U.S. 474, 481 (1988)). However, “the government may impose  
27 reasonable restrictions on the time, place, or manner of protected speech.” *Ward v.*  
28 *Rock Against Racism*, 491 U.S. 781, 791 (1989). Such regulations are permissible

1 as long as they are content-neutral, “are narrowly tailored to serve a significant  
2 governmental interest, and … leave open ample alternative channels for  
3 communication of the information.” *Id.* (quoting *Clark v. Community for Creative*  
4 *Non-Violence*, 468 U.S. 288, 295 (1984)). In non-public forums, the State’s  
5 regulatory authority is much greater, and restrictions on access will be upheld “as  
6 long as [they] are reasonable and [are] not an effort to suppress expression merely  
7 because public officials oppose the speaker’s view.” *Arkansas Ed. Television*  
8 *Comm’n v. Forbes*, 523 U.S. 666, 678 (1998).

9 The parties disagree whether the Market area itself constitutes a public  
10 forum. Plaintiffs argue that the Market is a public forum because it is held inside a  
11 park, which is a quintessential traditional public forum. *See, e.g., American Civil*  
12 *Liberties Union v. City of Las Vegas*, 333 F.3d at 1099 (“The quintessential  
13 traditional public forums are sidewalks, streets, and parks.”). Defendants do not  
14 contest that the park in which the Market takes place is a traditional public forum,  
15 but argue that the Market itself is at most a limited public forum because it was  
16 created for an express purpose other than providing a forum for speech. This raises  
17 an issue that does not fit neatly into the Supreme Court’s forum doctrine: the  
18 ability of the government to use a traditional public forum for other purposes. The  
19 Court is unaware of any binding case law squarely addressing whether a  
20 governmental agency may temporarily reserve part of a traditional public forum  
21 for its own event, even though that event may preclude the forum’s simultaneous  
22 use by other speakers.

23 Under Plaintiffs’ view, when an event is held on property constituting a  
24 traditional public forum, the character of the property itself—rather than the  
25 character of the event—continues to govern access to the property, and thus any  
26 restriction on access to the event as a forum for speech must be necessary to serve  
27 a compelling governmental interest or must be content-neutral and narrowly  
28 tailored to serve a significant governmental interest. The Court is not persuaded. If

1 Plaintiffs' position were accepted, many time-honored practices that have never  
2 been thought to raise First Amendment concerns would suddenly be  
3 constitutionally suspect. For example, it is a common practice for municipalities to  
4 hold parades. For the duration of the parade, the parade route—a traditional public  
5 forum—is rendered unavailable to those who might wish to hold a parade  
6 promoting a different message. Thus, the municipality's exclusive reservation of  
7 the parade route for its own speech undoubtedly constitutes an exclusion of  
8 speakers from a traditional public forum, yet it has never been suggested that a  
9 municipality must show the parade serves a compelling or even a significant  
10 governmental interest. It is sufficient that it constitutes a legitimate use of  
11 government property and that the property remains available for use at other times  
12 on a non-discriminatory basis.

13 Similarly, a public high school lacking an adequately large venue might  
14 properly reserve a public park in which to hold its commencement ceremony. It  
15 cannot reasonably be suggested that in doing so the school obligates itself to allow  
16 members of the public at large to give commencement speeches. Although the  
17 park itself may be a traditional public forum when not reserved for another use, a  
18 high school commencement ceremony is not a public forum, and nothing in the  
19 First Amendment prohibits the school from limiting commencement speakers to  
20 those chosen by the school itself. Plaintiffs' argument is therefore too broad. “[I]f  
21 the ability to exclude others from public property during the course of a limited,  
22 permitted use were found to be a constitutional violation, every picnic, wedding,  
23 company outing, meeting, rally, and fair held on public grounds would be subject  
24 to constitutional scrutiny.” *Villegas v. Gilroy Garlic Festival Ass'n*, 541 F.3d 950,  
25 957 (9th Cir. 2008).

26 Although the Supreme Court has never squarely addressed this precise  
27 issue, many of its precedents provide guidance. Municipalities have a significant  
28 interest in coordinating competing uses of public forums, so as not to undermine

1 the usefulness of those forums altogether. “For example, two parades cannot  
2 march on the same street simultaneously, and government may allow only one.”  
3 *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972); *Thomas v. Chicago Park*  
4 *Dist.*, 534 U.S. 316, 322 (2002) (“[T]o allow unregulated access to all comers  
5 could easily reduce rather than enlarge the park’s utility as a forum speech.”).  
6 Thus, a municipality may properly coordinate the use of a public forum for speech  
7 with other legitimate uses of the property. *Cox v. New Hampshire*, 312 U.S. 569,  
8 576 (1941) (“If a municipality has authority to control the use of its public streets  
9 for parades or processions, as it undoubtedly has, it cannot be denied authority to  
10 give consideration, without unfair discrimination, to time, place and manner in  
11 relation to the other proper uses of the streets.”); *Poulos v. New Hampshire*, 345  
12 U.S. 395, 405-06 (1953).

13 In some instances, the inability to exclude another speaker from a particular  
14 public forum at a particular time may impair a speaker’s ability to engage in  
15 protected speech. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of*  
16 *Boston*, 515 U.S. 557 (1995) (holding that Massachusetts violated the First  
17 Amendment when it prohibited the South Boston Allied War Veterans Council  
18 from excluding a group of would-be speakers from a parade held in a traditional  
19 public forum). A city may thus grant a group the exclusive right to utilize a public  
20 forum for a particular event and may enforce the exclusion of other speakers with  
21 inconsistent messages during that time, as long as the municipality is non-  
22 discriminatory in granting speakers the opportunity to use the forum. *See, e.g.*,  
23 *Sistrunk v. City of Strongsville*, 99 F.3d 194, 199 (6th Cir. 1996) (“[E]ven if  
24 plaintiff has alleged sufficient facts to establish that the city authorized the  
25 committee to exclude [from a traditional public forum] members of the public who  
26 sought to express a discordant message, plaintiff has not alleged that the city  
27 violated plaintiff’s free speech rights.”).

1           Of course, this authority is still subject to First Amendment limitations, and  
2 it cannot be used as a pretext for suppressing otherwise protected speech. “The  
3 privilege … to use the streets and parks for communication … must not, in the  
4 guise of regulation be abridged or denied.” *Hague v. C.I.O.*, 307 U.S. 496, 515-16  
5 (1939) (Roberts, J.). But “[r]egulation and suppression are not the same, either in  
6 purpose or result, and courts of justice can tell the difference.” *Poulos*, 345 U.S. at  
7 408. The Court therefore concludes that the State, by virtue of its authority to  
8 coordinate the multiple legitimate uses of public property, has the ability to  
9 temporarily reserve part of a public forum for its own particular use. And during  
10 that limited time, “[t]he State, no less than a private owner of property, has power  
11 to preserve the property under its control for the use to which it is lawfully  
12 dedicated.” *Adderley v. Florida*, 385 U.S. 39, 47 (1966). This necessarily implies a  
13 limited authority, under appropriate circumstances, to create a temporary non-  
14 public forum inside a traditional public forum.

15           The question remains whether the Market is in fact such a non-public forum.  
16 The Sixth Circuit has held that, where a block party is held in a traditional public  
17 forum and the event is free and open to the public, the event itself also remains a  
18 traditional public forum. *Parks v. City of Columbus*, 395 F.3d 643, 652 (6th Cir.  
19 2005) (“The City cannot … claim that one’s constitutionally protected rights  
20 disappear [where] a private party is hosting an event that remain[s] free and open  
21 to the public.”) (*quoted with approval by Gathright v. City of Portland, Or.*, 439  
22 F.3d 573 (9th Cir. 2006)). Here, in addition to being free and open to the public,  
23 the Torrance Farmer’s Market bears many of the traditional hallmarks of a public  
24 forum. Indeed, the Ninth Circuit has treated similar commercial areas that are  
25 open to the public as public forums for First Amendment purposes. *See, e.g.*,  
26 *American Civil Liberties Union v. City of Las Vegas*, 333 F.3d at 1103 (“[O]ur case  
27 law indicates that we regard public pedestrian malls and commercial zones as the  
28 type of property traditionally used as a public forum.”); *Gaudiya Vaishnava*

1       *Society v. City & County of San Francisco*, 952 F.2d 1059, 1061 (9th Cir. 1990)  
2       (Fisherman’s Wharf and Union Square districts are public forums); *Gerritsen v.*  
3       *City of Los Angeles*, 994 F.2d 570, 576 (9th Cir. 1993) (Olvera Street is a public  
4       forum); *Perry v. Los Angeles Police Dep’t*, 121 F.3d 1365, 1368 (9th Cir. 1997)  
5       (Venice Beach Boardwalk is a traditional public forum). In light of the many  
6       similarities between the Market and other commercial areas deemed to be  
7       traditional public forums, the Court concludes that the Market is a traditional  
8       public forum, no less than Olvera Street or Fisherman’s Wharf.

9           However, the “forum analysis is not completed merely by identifying” the  
10          Market as a public forum. *Cornelius v. NAACP Legal Defense & Ed. Fund*, 473  
11          U.S. 788, 801 (1985). Rather, the Court must look to “the access sought by the  
12          speaker.” *Id.* Here, there are two types of access sought by Plaintiffs, with each  
13          form of access requiring a separate analysis. Each is discussed in turn below.

14           **a. General Access to the Market**

15           The first form of access sought by Plaintiffs is the ability to engage in  
16          expressive conduct within the Market area generally. In other words, they seek  
17          general access to the Market. “When speakers seek general access to public  
18          property, the forum encompasses that property.” *Cornelius*, 473 U.S. at 801. This  
19          form of access is regulated by § II.8 of the Market Rules, which enumerates the  
20          expressive activities prohibited within the Market. Accordingly, the  
21          constitutionality of § II.8 is governed by the rules applicable to traditional public  
22          forums.

23           **b. Expressive Conduct User Spaces**

24           The second form of access sought by Plaintiffs is the ability to set up a  
25          booth in the Market and to use that booth as a platform for expression. Courts  
26          adopt a more tailored approach to determining the relevant forum when speakers  
27          “seek access to a particular means of communication.” *Cornelius*, 473 U.S. at 801.  
28          Unlike general access to the Market area, which is free and open to the public,

1 permission to set up a booth in the Market is not granted as a matter of course to  
2 the public at large, or even to those qualified to sell at the Market. (See Market  
3 Rules § III (“Qualifying to sell at the Market does not automatically insure  
4 admission in the Market. Admissible Sellers must apply to sell at the Market and  
5 be approved by the Market Manager to do so before they are authorized to sell at  
6 the Market.”).) Except for the three Expressive Conduct User Spaces provided for  
7 in §§ I.5 and III.4 of the Market Rules, booths in the Market are authorized at the  
8 City’s discretion for a non-expressive commercial purpose. These selling spaces  
9 are clearly not a designated public forum for expression. *See Seattle Mideast*  
10 *Awareness Campaign v. King Cty.*, 781 F.3d 489, 496 (9th Cir. 2015) (“The  
11 defining characteristic of a designated public forum is that it’s open to the same  
12 indiscriminate use and almost unfettered access that exist in a traditional public  
13 forum.”) (internal citations, quotation marks omitted).

14 It is a more difficult question whether Expressive Conduct User Spaces  
15 constitute a designated public forum. Access to this particular forum is regulated  
16 by § III.4 of the Market Rules, which govern “Admissible Sellers.” While these  
17 Spaces are set aside for expressive activity, they are not available for  
18 “indiscriminate use,” nor does the public enjoy “unfettered access” to them.  
19 *Seattle Mideast Awareness Campaign*, 781 F.3d at 496. Rather, an application  
20 must be submitted in order to use one. Ultimately, however, the Court need not  
21 determine whether Expressive Conduct User Spaces constitute a designated public  
22 forum or a limited public forum, because the city’s regulations regarding the use  
23 of the forum survive even under the heightened scrutiny that applies to designated  
24 public forums. Accordingly, the Court assumes without deciding that Expressive  
25 Conduct User Spaces constitute a designated public forum.

26 **3. Constitutionality of the Challenged Provisions**

27 Plaintiffs seek access to traditional and designated public forums, and so  
28 any restrictions on that access are subject to exacting scrutiny. “For the State to

enforce a content-based exclusion it must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.” *American Civil Liberties Union of Nevada v. City of Las Vegas*, 333 F.3d 1092, 1098 (9th Cir. 2003) (internal citations omitted). (quoting *Frisby v. Schultz*, 487 U.S. 474, 481 (1988)). However, “the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions ‘are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.’” *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 295 (1984)).

The two forms of access sought by Plaintiffs—access to the Market area generally and the use of Expressive Conduct User Spaces—are governed by different provisions in the Market Rules. Each is discussed in turn below.

#### **a. Restrictions on Speech in the Market Area Generally**

The restrictions on expressive use of the Market area generally are contained in § II.8,<sup>3</sup> which prohibits the following activities within the Market, except in Expressive Conduct User Spaces: (1) “[c]irculating an initiative or referendum petition, or circulating advertising brochures”; (2) “[u]nauthorized solicitation”; and (3) “[c]ommercial photography or videotaping.” (*Id.*)

Turning first to the prohibition on “[c]irculating an initiative or referendum petition, or circulating advertising brochures,” this is a content-based restriction on speech. Petitions relating to initiatives or referendums are prohibited, but petitions relating to any other subject are not. Similarly, a patron could circulate an informational brochure, as long as it is not an advertisement. As a content-based

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<sup>3</sup> As explained in Section III.B.1 above, the Court does not construe §§ I.5 and III.4 of the Market Rules as imposing any additional prohibitions on expressive conduct outside the Expressive Conduct Area.

1 restriction on speech, this prohibition must be supported by a showing that it is  
2 necessary to serve a compelling state interest and that it is narrowly drawn to  
3 achieve that end. This is a “demanding standard,” and “[i]t is rare that a regulation  
4 restricting speech because of its content will ever be permissible.” *Brown v.*  
5 *Entertainment Merchants Ass’n*, 564 U.S. 786, 799 (2011).

6 To justify its regulations, the City asserts an interest in preventing disruption  
7 to the normal flow of traffic within the market. Assuming, without deciding, that  
8 this constitutes a “compelling state interest” for purposes of First Amendment  
9 analysis, the Court concludes that the prohibition is nonetheless invalid because it  
10 is not narrowly drawn to achieving that end. There is no evidence in the record  
11 suggesting that initiative/referendum petitions and advertising brochures pose any  
12 more threat to the City’s asserted interest than other types of petitions and  
13 brochures. Thus, the City’s “regulation is wildly underinclusive when judged  
14 against its asserted justification, which … is alone enough to defeat it.” *Id.* at 802.  
15 Because the City’s prohibition on “[c]irculating an initiative or referendum  
16 petition, or circulating advertising brochures” is a content-based restriction on  
17 speech that is not narrowly tailored to achieving a compelling state interest, it is  
18 facially invalid under the First Amendment.<sup>4</sup> Accordingly, the Court grants  
19 Plaintiffs’ motion for partial summary judgment insofar as it seeks a determination  
20 that the Market Rules’ prohibition on “[c]irculating an initiative or referendum  
21 petition, or circulating advertising brochures,” is facially invalid under the First  
22 Amendment.

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25 <sup>4</sup> Because the prohibition is invalid as a content-based restriction, the Court need not determine  
26 whether a content-neutral ban on circulating any petition or brochure would be valid. *See*  
27 *Heffron v. Int’l Soc. for Krishna Consc.*, 452 U.S. 640 (1980) (upholding a State Fair’s  
28 prohibition on “distribution of any … printed or written material except … from a duly-licensed  
location” as a reasonable time/place/manner regulation); *but see Lee v. Int’l Soc. for Krishna  
Consc.*, 505 U.S. 830, 831 (1992) (striking down a “ban on distribution of literature in … airport  
terminals”).

1           The Court now turns to the prohibition on “unauthorized solicitation,”  
2 which is defined as “solicitation that is unrelated to the Market, is not conducted  
3 from an authorized selling space, or both.” (Market Rules § II.8.) Plaintiffs argue  
4 that this prohibition should be subject to the exacting scrutiny reserved for  
5 content-based regulations, because “solicitation that is unrelated to the Market” is  
6 prohibited, while solicitation that is related to the Market is not prohibited.  
7 (Market Rules § II.8.) However, this argument overlooks the fact that all  
8 solicitation “not conducted from an authorized selling space” is banned,  
9 irrespective of its content. (*Id.*) Thus, the rule is content-neutral with respect to  
10 solicitation by non-sellers. It is only speech conducted from authorized selling  
11 spaces that is being regulated based on its content. Because selling spaces within  
12 the Market are not public forums,<sup>5</sup> the use of those spaces for speech are subject to  
13 reasonable, viewpoint-neutral regulation. The Court concludes that restricting  
14 Market sellers to Market-related solicitation is both a reasonable and a viewpoint-  
15 neutral regulation.

16           With respect to the prohibition on all solicitation “not conducted from an  
17 authorized selling space,” the Court finds this to be a valid regulation of the time,  
18 place, and manner of speech. The Supreme Court has “on many prior occasions  
19 noted the disruptive effect that solicitation may have” on a public space. *Int’l Soc.*  
20 *for Krishna Consc. v. Lee*, 505 U.S. 672, 683 (1992). “[Those] who wish to avoid  
21 the solicitor may have to alter their paths, slowing both themselves and those  
22 around them. The result is that the normal flow of traffic is impeded.” *Id.* at 683-  
23 84. The First Amendment has “never been thought to give absolute protection to  
24 every individual to speak whenever or wherever he pleases, or to use any form of  
25 address in any circumstances that he chooses,” *Cohen v. California*, 403 U.S. 15,  
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27           <sup>5</sup> The Court does not understand Plaintiffs to contend otherwise, since access to selling space  
28 within the Market is highly regulated and has not generally been opened to the public for  
expressive purposes. (See Market Rules §§ II.1, III.)

19 (1971). Thus, in contexts where the State’s interests in “[t]he flow of the crowd  
2 and demands of safety are more pressing,” the Court has upheld regulations  
3 “confining distribution, selling, and fund solicitation activities to fixed locations.”  
4 *Heffron v. Int’l Soc. for Krishna Consc.*, 452 U.S. 640, 651, 654 (1981). Here, as  
5 in *Heffron*, the City’s interest in regulating the flow of the crowd “is sufficient to  
6 satisfy the requirement that a place or manner restriction must serve a substantial  
7 state interest.” *Id.* at 654. On Market days, the Market hosts over 100 vendors and  
8 nearly 3,000 patrons in a space that is less than 2 acres in area. A regulation  
9 confining solicitation activities to booths and areas adjacent to the Market is  
10 reasonable and is narrowly tailored to regulating the flow of the resulting crowd  
11 within the Market.

12 In order for the rule to be valid as a time, place, and manner restriction, “it  
13 must also be sufficiently clear that alternative forums for the expression of  
14 [Plaintiffs’] protected speech exist despite the effects of the Rule.” *Heffron*, 452  
15 U.S. at 654. Here, Plaintiffs “may mingle with the crowd and orally propagate  
16 their views.” *Id.* at 655. Additionally, the Market is surrounded on all four sides by  
17 public property—public streets, a public parking lot, and a public park (Dkt.  
18 No. 41-2)—and the rules regarding solicitation “do not preclude any person or  
19 organization from conducting these activities during Market hours on sidewalks or  
20 other public property adjacent to the Market.” (Market Rules § II.8.) “Thus the  
21 resulting access of those who would solicit the general public is quite complete.”  
22 *Int’l Soc. for Krishna Consc. v. Lee*, 505 U.S. at 684-85.

23 Because the Market’s solicitation rules are narrowly tailored to achieving a  
24 significant state interest and ample alternative forums for solicitation exist, the  
25 rules constitute a permissible regulation of the time, place, and manner of speech.  
26 Accordingly, the Court denies Plaintiffs’ motion for partial summary judgment  
27 insofar as it seeks a determination that the Market Rules’ prohibition on  
28 solicitation are invalid under the First Amendment.

Finally, § II.8 of the Market Rules prohibits “[c]ommercial photography or videotaping” outside the Expressive Conduct Area. Although Plaintiffs seek partial summary judgment that § II.8 is invalid in its entirety, they have not provided any argument or authority for concluding that the prohibition on commercial photography and videotaping is invalid under the First Amendment. Accordingly, the Court denies Plaintiffs’ motion for partial summary judgment insofar as it seeks a determination that the Market Rules’ prohibitions on commercial photography and videotaping are invalid under the First Amendment.

**b. Restrictions on Access to Expressive Conduct User Spaces**

Plaintiffs challenge the City’s rules that (1) limit the number of Expressive Conduct Users to three per Market day; (2) require speakers to reserve Expressive Conduct User Spaces in advance; (3) limit Expressive Conduct Users to one Tuesday and one Saturday per month; and (4) prevent speakers from using empty Expressive Conduct User Spaces that are reserved by someone else. Each challenge is discussed in turn below.

Plaintiffs first challenge § III.4’s provision limiting use of the Expressive Conduct Area to “[t]hree or fewer Expressive Conduct Users per Market day.” The Court finds this to be a reasonable, content-neutral regulation on the use of a designated public forum. The Expressive Conduct Area itself is only 30' x 10' in size,<sup>6</sup> so “allow[ing] unregulated access to all comers could easily reduce rather than enlarge the [Area’s] utility as a forum for speech.” *Thomas*, 534 U.S. at 322. The City therefore can permissibly restrict the Area to the number of users

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<sup>6</sup> To the extent Plaintiffs are challenging the size of the Expressive Conduct Area, the Court notes that this is not a restriction on access to the forum, but rather a characteristic of the forum itself. The Court is unaware of any precedent permitting a speaker to challenge the size of a designated public forum on the basis that a larger forum would be more conducive to speech. Indeed, the government is under no obligation to create or maintain a designated public forum. Cf. *Seattle Mideast Awareness Campaign*, 781 F.3d at 496 (“[T]he government may close a designated public forum whenever it chooses....”). It is therefore true *a fortiori* that it is under no obligation to maintain a bigger public forum than it chooses to.

1 reasonably able to use the forum simultaneously. *Cf. Grayned v. City of Rockford*,  
2 408 U.S. at 115 (“[T]wo parades cannot march on the same street simultaneously,  
3 and government may allow only one.”). Accordingly, the Court denies Plaintiffs’  
4 motion for partial summary judgment insofar as it seeks a determination that  
5 limiting the use of the Expressive Conduct Area to three users per Market day is  
6 an invalid restriction on access to a public forum.

7 Plaintiffs also challenge the Market Rules’ requirement that Expressive  
8 Conduct User Spaces be reserved in advance, arguing that this constitutes an  
9 impermissible prior restraint on speech. However, the Court finds the prior  
10 restraint cases cited by Plaintiffs inapposite. “[T]he [reservation] required is not  
11 the kind of prepublication license deemed a denial of liberty since the time of John  
12 Milton but a ministerial … routine for adjusting the rights of citizens so that the  
13 opportunity for effective freedom of speech may be preserved.” *Poulos*, 345 U.S.  
14 at 403. The reservation requirement “does not authorize a licensor to pass  
15 judgment on the content of speech: None of the grounds for denying a permit has  
16 anything to do with what a speaker might say.... And the object of the  
17 [reservation] system (as plainly indicated by the permissible grounds for ...  
18 denial) is not to exclude communication of a particular content, but to coordinate  
19 multiple uses of limited space....” *Thomas*, 534 U.S. at 322. Accordingly, the  
20 Court concludes that “the [reservation] scheme at issue here is not subject-matter  
21 censorship but content-neutral time, place, and manner regulation of the use of a  
22 public forum.” *Id.* Accordingly, Plaintiffs’ motion for partial summary judgment is  
23 denied insofar as it seeks a determination that the Market Rules’ reservation  
24 requirement for Expressive Conduct User Spaces is invalid under the First  
25 Amendment.

26 Plaintiffs also challenge the Market Rules’ provision “limiting speech to  
27 only one Tuesday and one Saturday per month.” (Dkt. No. 40 (“Motion”) at 17.)  
28 However, the Market Rules do not actually prohibit speakers from using

Expressive Conduct User Spaces more than twice per month; they only prevent them from reserving Spaces on more than two days per month. (Market Rules § III.4.d.) If any Spaces for a given Market day remain unreserved at the end of the application period, the Market Manager informs the applicants, who may show up on that day to claim the spots on a first-come-first-served basis. (Market Rules §§ III.4.f-g.) Like the reservation system itself, this is a reasonable regulation that “serve[s] to further the government’s interest in coordinating multiple uses of limited public space.” *Berger v. City of Seattle*, 569 F.3d 1029, 1042 (9th Cir. 2009). To the extent all spaces are reserved in a given month, the regulation increases the number of users who can reach the crowds at both the Tuesday and Saturday Markets, and to the extent spaces are left unreserved at the end of the reservation period, all would-be speakers are given equal opportunity to claim those spaces on the day of the Market. Accordingly, the Court denies Plaintiffs’ motion for partial summary judgment insofar as it seeks a determination that limiting each speaker to reserving an Expressive Conduct User Space on one Tuesday and one Saturday per month is an invalid restriction on access to a public forum.

Finally, Plaintiffs challenge the absence of any rule either (a) penalizing individuals who reserve Spaces but fail to claim them, or (b) forfeiting reservations that are not claimed by a particular time so that others can use the unclaimed Spaces. According to Plaintiffs, this “allows no-show Users to make repeated reservations, leave … spaces vacant, and effectively suppress the number of Users at the Market.”<sup>7</sup> (Motion at 18.) Thus, Plaintiffs essentially contend that the City has abridged their freedom to use a designated public forum by failing to impose sufficient conditions on other speakers’ use of the forum. Assuming

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<sup>7</sup> Importantly, Plaintiffs do not suggest that the City itself is actively causing Spaces to be reserved and left vacant in order to decrease the number of Expressive Conduct Users. They simply contend that the policy does nothing to prevent that result.

1 *arguendo* that the City could permissibly impose such conditions on the use of a  
2 designated public forum, Plaintiffs have cited no authority suggesting that an  
3 otherwise valid reservation system is rendered invalid by the absence of those  
4 conditions. Although provisions penalizing “no-show Users” or forfeiting  
5 reservations might have the incidental effect of making more Spaces available for  
6 Plaintiffs’ use,<sup>8</sup> they would also render the Expressive Conduct Area less  
7 accessible to speakers who might only be able to use the Area near the end of the  
8 Market day or who are not certain whether they will be able to attend the Market  
9 on a given day. Nothing in the First Amendment purports to dictate the City’s  
10 choice between these two options.

11 Having adopted a valid reservation system for Expressive Conduct User  
12 Spaces, the City can properly prohibit the use of reserved Spaces by those without  
13 reservations, in order to maintain their availability for those who reserved them.  
14 Accordingly, the Court denies Plaintiffs’ motion for summary judgment insofar as  
15 it seeks a determination that the First Amendment requires the City to penalize  
16 those who fail to claim their reserved Spaces by a particular time.

#### 17       **4. Plaintiffs’ Other Arguments**

18 Having concluded that § I.5, § II.8, and § III.4 of the Market Rules are not  
19 facially unconstitutional under the First Amendment, with the exception of their  
20 prohibition on “[c]irculating an initiative or referendum petition, or circulating  
21 advertising brochures,” the Court now turns to Plaintiffs’ alternative arguments for  
22 invalidating the provisions. First, Plaintiffs argue the provisions should be  
23 invalidated under the California Constitution, because it “provides much greater  
24 protection for speech than does the federal constitution.” (Dkt. No. 48 (“Reply”) at  
25 9.) However, beyond this general assertion, the only difference in protections

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27       <sup>8</sup> Plaintiffs argue in their motion that the lack of a forfeiture provision has resulted in Spaces  
28 remaining unused on certain Market Days, despite Plaintiffs’ desire to use those spaces.  
However, Plaintiffs have not included this factual assertion in their Statement of Undisputed  
Facts.

1 identified by Plaintiffs is that under California law, “private property can constitute  
2 a public forum for free speech if it is open to the public in a manner similar to that  
3 of public streets and sidewalks.” *Fashion Valley Mall, LLC v. Nat'l Labor  
4 Relations Bd.*, 42 Cal. 4th 850, 858 (2007); *see also Robins v. Pruneyard Shopping  
5 Ctr.*, 23 Cal. 3d 899, 910 (1979) (“[T]he California Constitution protect[s] speech  
6 and petitioning, reasonably exercised, in shopping centers even when the centers  
7 are privately owned.”). Because the property at issue in this case is indisputably  
8 public, California’s extension of speech protections to private property is not  
9 applicable. None of the cases identified by Plaintiffs purport to hold that the  
10 California Constitution requires stricter scrutiny of speech regulations on public  
11 property than does the federal constitution. Accordingly, Plaintiffs’ facial  
12 challenge under the California Constitution fails for the same reason as does their  
13 facial challenge under the federal constitution.

14 Plaintiffs also argue that, even if the Market Rules are facially permissible,  
15 they have been “applied to target Plaintiffs who had a history of frequent use of  
16 the Market for their free speech before the Ordinance was enacted.” (Motion at  
17.) If a facially valid ordinance is in fact being used to target Plaintiffs on account  
18 of their viewpoint, such application would be unconstitutional under the First  
19 Amendment. *See, e.g., Foti v. City of Menlo Park*, 146 F.3d 629, 635 (noting that,  
20 even where a facial challenge fails, “a litigant may separately argue that  
21 discriminatory enforcement of a speech restriction amounts to viewpoint  
22 discrimination in violation of the First Amendment”); *accord City Council of the  
23 City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984).

24 However, the Court finds that there is a dispute of material fact regarding  
25 whether the ordinance has been applied so as to target Plaintiffs. Defendants deny  
26 that they target Plaintiffs in their enforcement of the Market Rules. (*See, e.g.*, Dkt.  
27 No. 41-1 (“Chan Decl.”) at ¶ 14 (“Ever since the adoption of the Ordinance, City  
28 staff has always attempted to uniformly enforce the established Rules and

Regulations relating to the reservation and use of the [Expressive Conduct] stalls.”).) Although Plaintiffs do proffer some evidence to support their allegation of discriminatory enforcement,<sup>9</sup> Defendants have proffered conflicting evidence.<sup>10</sup> The determination of which evidence to credit and what inferences to draw is properly reserved for trial. Because there is a genuine dispute of material fact regarding whether the City enforces the Market Rules evenhandedly, partial summary judgment on Plaintiffs’ enforcement-based challenge is not appropriate.

## IV. CONCLUSION

The Court **GRANTS** Defendants' motion for partial summary judgment. The Court **GRANTS** Plaintiffs' motion for partial summary judgment insofar as it seeks a determination that the Market Rules' prohibition on “[c]irculating an initiative or referendum petition, or circulating advertising brochures” within the Market is an invalid content-based restriction on speech. The Court denies Plaintiffs' motion for partial summary judgment insofar as it seeks a determination that other provisions in the Market Rules are unconstitutional under the First Amendment.

## IT IS SO ORDERED.

DATED: August 27, 2018

see below

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**CONSUELO B. MARSHALL**  
**UNITED STATES DISTRICT JUDGE**

<sup>9</sup> (E.g. Dkt. No. 40-2 (“Mahgerefteh Decl.”) at ¶ 8 (“I have personally observed Girl Scout troops using the Zone for four Saturdays in the same calendar month, as well as a man who used the Zone to promote the Democratic party using the Zone on two Saturdays in the same month.”).)

<sup>10</sup> (E.g. Chan Decl. at ¶ 23 (“On occasion, Girl Scout troops reserve stall space []in the [Expressive Conduct Area], primarily for selling cookies. Each individual troop is subject to the uniformly enforced rule that it may not reserve a space more than one Saturday and one Tuesday per month. Further, Plaintiffs’ allegation that a man promoting the Democratic party used the [Expressive Conduct Area] on two Saturdays within the same calendar month is incorrect. He attempted to do so, but I told him he could not attend, and he in fact did not attend.”).)

# Appendix

## Challenged of Market Rules

## I. Definitions

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5. Expressive Conduct Users: Expressive Conduct Users include but are not limited to fundraising and information sharing by community groups and individuals, political outreach and campaigning. A defined area (10' x 30') within the Market footprint will be provided for Expressive Conduct Users each market, on a first come – first served basis application process.

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## II. General Policies and Procedures

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8. The following activities are prohibited within the Market, except at Expressive Conduct User Spaces:

- Circulating an initiative or referendum petition, or circulating advertising brochures;
- Unauthorized solicitation — For purposes of this prohibition, “unauthorized solicitation” means solicitation that is unrelated to the Market, is not conducted from an authorized selling space, or both. These prohibitions do not preclude any person or organization from conducting these activities during Market hours on sidewalks or other public property adjacent to the Market. Violation of these prohibitions will result in expulsion from the Market for the remainder of that Market day.
- Commercial photography or videotaping.

• • •

### III. Admissible Sellers & Products

1                   Admissible Sellers and products fall into the categories defined below.  
2                   Qualifying to sell at the Market does not automatically insure admission in  
3                   the Market. Admissible Sellers must apply to sell at the Market and be  
4                   approved by the Market Manager to do so before they are authorized to sell  
5                   at the Market. The right to sell at the Market is terminable at any time by  
6                   written notice to the applicable Seller from the Market Manager.

7                   ...

8                   4. Expressive Conduct Users — Groups or individuals are allowed in a  
9                   designated area of the Market. Three or fewer Expressive Conduct  
10                  Users per Market day are allowed to set up in the Expressive Conduct  
11                  Area of the Market. All Expressive Conduct Users are required to fill  
12                  out an application for review. No one selling mass produced,  
13                  commercial items (except for fundraising) will be allowed in this area.  
14                  Admission of Expressive Conduct Users. Prospective Expressive  
15                  Conduct Users will be considered for participation in the Market by  
16                  the Market Manager, subject to the conditions listed in subsections  
17                  a.-h. below. Prospective Expressive Conduct Users will be asked to  
18                  complete an application, which will include the activity desired to be  
19                  conducted at the Market and if applicable, products to be sold.  
20                  Advance scheduling with the Farmers' Market Manager is required  
21                  before entry into the market. Activities that can take place in this zone  
22                  include but are not limited to fundraising and information sharing by  
23                  community groups and individuals, political outreach and  
24                  campaigning.

25                  a. Applications will be accepted from the first business day of the  
26                  month to the end of the Market on the 2nd Saturday of the  
27                  month for stall assignments in the following month.

- b. Applications for Expressive Conduct User spaces will be accepted on a first come-first served basis, and will be date and time stamped upon receipt. Applications can be sent electronically, through the U.S. mail, or hand-delivered.
- c. Each applicant for an Expressive Conduct User space will be required to complete a scheduling preference form.
- d. Applicants for Expressive Conduct User spaces will be required to select not more than one Saturday Market day and one Tuesday Market day for the appropriate month and list the Market days in which they are interested, in order of preference.
- e. The Market Manager will fill Expressive Conduct User spaces on a first come-first served basis, according to the applicant's schedule preferences. If there are more applicants than spaces available, no wait list will be established.
- f. The Market Manager will notify Expressive Conduct User applicants of the status of their applications during the week following the third Saturday Market of each month. The Market Manager will also advise applicants if there are Market Days with spaces available.
- g. Between 7:00 a.m. and 7:30 a.m. on each Market day, Market staff will be available to accept additional applications for any unreserved Expressive Conduct User spaces for that Market day. Unreserved spaces will be filled on a first come-first served basis.
- h. Fundraising is permitted at the Farmers' Market. Selling food is allowable if the organization has obtained an Exemption Certification for Community Events from the Los Angeles County Department of Public Health, Environmental Health

1                   Division. Organizations who fundraise by selling food are  
2                   required to obtain an Exemption Certification for Community  
3                   Events permit.

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